



## **Air Force Association Ltd**

# **PRODUCTIVITY INQUIRY INTO COMPENSATION AND REHABILITATION FOR VETERANS SUPPLEMENTARY RESPONSE**

### **Introduction**

1. Air Force Association Ltd (AFA) is grateful for the opportunity to have given oral evidence at the Inquiry's Public Hearings and in subsequent private discussions. We ground the following additional evidence in the latter experiences.
2. As a Member of the Alliance of Defence Service Organisations (ADSO), AFA stands by the ADSO Response. This Supplementary Response should therefore be read in conjunction with the ADSO Submission on the Issues Paper and both ADSO and AFA's Responses to the Draft Report.

### **Qualification of Draft Report**

3. Before addressing our unresolved concerns, we note that the Inquiry has qualified - what the ESO community has seen as - some of the least acceptable proposals in the Draft Report. Specifically, we note the Inquiry's intention that the following changes to the veteran support system would occur over a period of time:
  - a. certain characteristics of contemporary workers' compensation practices are to be introduced into veterans' compensation; and
  - b. removal of the VRB's decision-making powers and truncating of the Review pathway from (effectively) internal Review then to the AAT.
4. We note that at various points in the Public Hearings, the envisaged time horizon was as much as 20-30 years and as few as 10-15. With the Draft Report not including an implementation plan and culture change program, this did not engender confidence in the recommendations.

### **Inquiry Focus**

5. We note that a recurrent theme in the Public Hearing and, particularly during our private discussion, was our views on the following:
  - a. Curtailment of VRB Powers. Removal of the VRB's authority to conduct Hearings and to make independent decisions.
  - b. Transition. The need for a Joint Transition Command.
  - c. Disestablishment of DVA. Restructuring management and administration of veterans' support and establishment of a statutory body (Veteran Services Commission).



6. We are concerned that the Inquiry has not resiled from its recommendations with respect to the preceding three issues in the Draft Report. We address these three issues next.

### Curtailment of VRB Powers

7. **Inquiry Position.** We note the Inquiry's comments that:
  - a. the VRB is stressful for the veteran,
  - b. the veterans' review pathway is the only Australian Commonwealth process that has an intermediate step between internal review and the AAT, and
  - c. *'has functions that overlap with those of the Administrative Appeals Tribunal'* (Draft Finding 10.4).
8. **AFA Counter-Position.** We would be most concerned if this were the rationale for curtailment of the VRB's powers. In this respect, we contend that:
  - a. the AAT is inevitably more stressful for the applicant than the VRB because:
    - i. rather than inquisitorial (VRB), the process is adversarial (AAT); and
    - ii. with barristers engaging, the veterans' concerns (acceptance of her/his conditions and/or lifestyle consequences) will be subsumed by citing and interpreting legislation and case law.
  - b. curtailment of VRB powers because they are unique begs identification and analysis of why they are unique; and
  - c. the sole functional *'overlap'* we can discern is that internal reconsideration, VRB and AAT all engage merits review processes.<sup>1, 2</sup>
9. **Way Forward.** We reiterate ADSO's concern that the Inquiry has yet to establish a supportable rationale for curtailment of VRB powers.

### Transition

10. **Background.** Since 2014, AFA has been increasingly more closely engaged with serving RAAF personnel as well as contemporary veterans from all three Services. Our experience confirms that:
  - a. transitioning service personnel need and want support, and
  - b. the existing transition process is inadequate.
11. **Current AFA Position.** We do not resile from ADSO's rejection of the recommendation that a Joint Transition Command be established in Defence (para 17.f.; p. iv). Nothing

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<sup>1</sup> [A] merits review body will "stand in the shoes" of the primary decision-maker, and will make a fresh decision based upon all the evidence available to it. <http://classic.austlii.edu.au/au/journals/AdminRw/2000/2.pdf> (accessed 12 March 2019)

<sup>2</sup> What is merits review? The conventional answer is that it is review which is wider than correcting legal error. It extends to a reconsideration of discretionary matters - of the merits of the original decision... Merits review and judicial review can undoubtedly overlap but the power of courts to substitute a decision is much more limited than is the power of merits review tribunals'. <https://www.aat.gov.au/about-the-aat/engagement/speeches-and-papers/the-honourable-justice-garry-downes-am-former-pre/reasonableness-proportionality-and-merits-review> (accessed 12 March 2019)



we have heard from our interlocuters, from our reading of the Draft Report or during the Public Hearings or private discussions justifies a Joint Transition Command.

12. **Further Research.** Our overwhelming concern is that the Inquiry's recommendation is not grounded in robust empirical evidence. Given the critical importance of transition to veteran and family wellbeing, we submit that the Inquiry make no findings until incontestable quantitative and qualitative research has been undertaken.
13. **Possible Alternative Structures.** Depending on the evidence collected and analysed, we would like to propose two alternative structures obviate institutional separation and focus life-long support for transitioning ADF Members and transitioned veterans argued in the Draft Report, Section 11.4 (see pp.456-459):
  - a. a permanent, joint ADF-DVA Task Group; or
  - b. a statutory body (Veterans Transition Commission).

#### *Joint Task Force*

14. Given the Inquiry findings and ADSO's rejection of a new Command in Defence, a rational alternative is remediation of the current failings (para 13 above). Looking at the failings from our Members' experience, three considerations are to the fore:
  - a. The ADF is, understandably given its defence role, not intimately concerned about the transition process.
  - b. The (mostly APS) Defence Community Organisation appears to not be satisfying discharging personnel's needs or expectations. Indeed, anecdotal evidence is that many are discharging without either being aware or availing themselves of DCO transition services.
  - c. Given the ADF's role is to prepare for combat and prosecute operations, it is unreasonable to expect Defence to attach any priority whatsoever to lifelong care of transitioned personnel.
15. The preceding considerations suggest that the cause of institutional separation is role-related and improbably resolved by structural change. If this argument has merit, failings are more likely to be remedied by working within existing roles and current structures. It is for this reason that we propose (as one alternative) the establishment of a Permanent, Joint ADF-DVA Task Group with clear divisions of responsibility:
  - a. **ADF Responsibility.** We have advised the Inquiry that ADF Senior Commanders and the ADF Commander's Courses reinforce the command responsibility to attend to subordinates' wellbeing. Supporting Members' preparation for transition is an element of this responsibility. We have also advised the Inquiry that this responsibility can be reinforced through the Annual Efficiency/ Performance reporting system. To ensure procedural fairness, ADF Senior Command would need to promulgate clear and specific policy on commanders' responsibilities down through the command structure. ADF Members of the Task Force would be responsible to the Senior Command for implementation of the policy.



b. DVA Responsibility. Clearly, DVA has accepted that it is responsible for veterans and families' wellbeing. That this is a lifelong responsibility is incontestable in the MRCA. We refer here to the legislated provisions for veterans and their dependents where the veteran is severely impaired by, killed during or dies as a result of their service. We also note that MRCA s38, Aim of Rehabilitation, addresses DVA's responsibility to deliver services focused on the veteran's health, psycho-social and occupational wellbeing. Promulgation by DVA of its specific post-transition responsibilities is therefore already sanctioned. From another perspective, DVA's role in the Prime Minister's Veterans' Employment Program represents the foundations of a more encompassing employment support responsibility. As are many other services, we propose that DVA would out-source delivery of employment support services.

16. Establishment of a Permanent Joint ADF-DVA Transition Task Group would ensure:
- a. coordination of transition policy and procedures;
  - b. seamless transition of ADF Members into the veteran community; and
  - c. monitor and evaluate the timeliness and quality of out-sourced services delivered to veterans.

#### *Veteran Transition Commission*

17. **Rationale.** Alternatively, we see merit in the creation of statutory authority that is responsible for performing the functions identified in the Draft Report, Section 7.6 (see p. 281):
- a. The rationale for a Veterans Transition Commission is analogous to most – if not all – the reasons the Inquiry advances to.
  - b. Such a Commission would have a corporate structure:
    - i. governed by a Board with the private sector skills and experience needed to facilitate transition to civil employment, and
    - ii. staffed by persons with the professional qualifications needed to assure the support services identified for the Joint Transition Command.
18. **Caveat.** As we discuss in the following section, the structure, covering legislation and staffing of the statutory body would be critical. The body would mandatorily have to ensure that:
- a. its operations are transparent;
  - b. its office holders and staff are accountable to the veteran community;
  - c. it is governed by a Board with a balance of military and civil employment skills and experience;
  - d. staffed by personnel with robust military and civil employment knowledge, skills and experience.
19. **Recommendation.** We commend further research to the Inquiry, leading to consideration of the relative merits of the alternative transition structures.



## Veteran Services Commission

20. Our support for a Veterans Transition Commission will seem at odds with our rejection of a Veteran Support Commission. We outline two different approaches below:
- a. Functional and Pragmatic; and
  - b. Commonwealth Governance Guidelines.

### *Functional and Pragmatic*

21. **No Inconsistency.** We contend that there is no inconsistency in our approach:
- a. We reject the notion of a Veteran Support Commission because:
    - i. the primary justification for the Commission is the purported need to introduce civilian workers' compensation practices into veterans' compensation; and
    - ii. the Board expertise is focused on 'workers' compensation industry best-practice for claims management' with ADF representation de-emphasised (p. 460).
  - b. On the other hand, establishment of a Veteran Transition Commission:
    - i. obviates diversion of Defence from a responsibility that is completely foreign to its function;
    - ii. creates an entity that is consistent with Government policy; and
    - iii. brings private sector skills and expertise to bear on the transition process and life-long support through ongoing education and skills development as the economy evolves.
22. **Syllogisms.** On the basis of comments made during Public Hearing and private discussions, two syllogisms are suggested. We contend that the following comments, in particular, are contentious; viz., that:
- a. 'because it is Government policy' (our emphasis), the Inquiry is applying the term 'veteran' to any ADF Member who has at least one day of continuous fulltime service; and
  - b. DVA should be replaced by a statutory body because:
    - i. a '*departmental structure is not appropriate for service delivery*'; and
    - ii. '*the Secretary is responsible to a Minister*'.
23. Implications of Government Policy.
- a. Given the Inquiry's adherence to the minor Government policy on who is a 'veteran', we contend for the following reasons that the Inquiry's statement that it is not driven by austerity is potentially specious:
    - i. Successive Australian Governments from the 1980s to the present have applied supply-side/trickle-down/neo-liberal economic theory.
    - ii. Reduced taxation and austerity are key elements of Australian Governments' economic theory.



- iii. If the Inquiry adheres to Government policy on the definition of a veteran, it is improbable it could ignore Government economic policy – especially when the Treasurer has set the Inquiry's ToR.
  - b. We also note that Government policy is focused on 'Jobs and Growth'. In this respect, the Inquiry's comment that its recommendations will cost Government more than the current veteran support system is, at least, contentious:
    - i. Marketisation of hitherto Government-provided services creates jobs.
    - ii. Growth occurs in the private sector and is driven by profitability (noting Governments' long-standing policy to reduce the size of the public sector and its involvement in the economy).
    - iii. The evidence across many marketisation initiatives is that, too often:
      - (a) regulatory bodies in the market economy provide weak oversight;
      - (b) de-regulation results in failures of transparency and accountability;
      - (c) rent-seeking flourishes; and
      - (d) the quality of services delivered.
24. **Service-Delivery-Driven Structure.**
- a. The accelerating information economy is fundamentally changing the economic concepts of goods and services. The production of information is economically significant – both as a good and as a service.
  - b. From this perspective:
    - i. the production of policy is a significant contribution to the information economy;
    - ii. if a departmental structure is not appropriate to service delivery, then it is not appropriate to policy departments; and
    - iii. if a statutory body is the only governance structure that is appropriate to service delivery, then, in an information economy, all departments should be transformed into statutory bodies.
25. **Recommendation.** While we recognise that the preceding syllogism has a touch of the absurd about it, we commend the Inquiry's reconsideration of its current position on the preceding functional and pragmatic issues.

#### *Commonwealth Governance Guidelines*

- 26. **Lack of Specificity.** As ADSO stated in its Response (para 20.g; p. 9), its Members including AFA have fundamental concerns about the lack of specifics in the Inquiry's recommendation that a statutory agency be created to manage the veteran support system. These concerns have been exacerbated by further research.
- 27. **Indicative Results of our Research.** From our research, we note the following:



- a. The recommendation appears consistent with Australian Public Sector Reforms stemming from the 1994 McLeod Report and the then Minister Reith's 1996 Discussion Paper.<sup>3</sup>
- b. Said another way:
  - i. the creation of a Statutory Authority continues a 25-year old program of downsizing the APS; and
  - ii. on the evidence of the Draft Report, whether the 1996 assessments remain applicable appears to be no longer challenged.
- c. Our research suggests that there are significant differences between the powers of an 'executive agency' and 'statutory authority'. Accepting that an 'executive agency' may be different to a 'statutory agency', the Draft Report describes the Veteran Services Commission variously as being a 'statutory authority' and a 'statutory agency'.<sup>4</sup> The mixing of possibly key terminology (see the following sub-para c.) does not engender confidence in the Inquiry's intentions.
- d. The various combinations of Acts and structures that are possible under the Commonwealth guidelines make it even more necessary that the Final Report be rigorously unambiguous in its recommendations. We contend that anything less fails the principle of 'informed consent'.<sup>5</sup>

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<sup>3</sup> *'The McLeod Report (1994)...was generally endorsed by the Government, but in March 1996...[t]he [incoming] Coalition embarked on its own reform path...The then Minister, Peter Reith, issued a Discussion Paper which contended that the existing employment framework was a major barrier to the necessary improvement of performance in the APS. He identified several problems.*

- *The first was the complexity of the employment framework...[which] tied management of the APS 'in red-tape', produced 'a process-driven culture' and 'an entitlement mentality', and inhibited innovation and best practice.*
- *The second was 'unrealistic presumptions' that the APS was a uniform labour market, and that equity necessitated identical treatment of individuals...'*

We note that the second dot point may be applied to the Inquiry's purported inequity resulting from two standards of proof and two sets of SoPs. The presumption that the ADF should provide uniform employment – and therefore the identical compensation support for veterans – is 'unrealistic'.

<sup>4</sup> See:

- Statutory Agency: Key Points (p. 2); Section 5 (p. 27); Section 11 (pp. 431, 455 and 458); Table 17.5 (p. 652); and
- Statutory Authority: Draft Recommendation 11.2 (pp. 56 and 460).

<sup>5</sup> Of concern to us are, *inter alia*, the following paragraphs from the Office of the Parliamentary Counsel, Drafting Direction No. 3.6, 'Statutory and other bodies', October 2012, <https://www.opc.gov.au/sites/g/files/net2056/f/dd3.6.pdf> (accessed 12Mar19):

- paras 38-39 re incorporation v unincorporated, subject to either FMA Act 1997 or CAC Act 1997 or both.
- para 42: *Finance prefers having money and property handled under the FMA Act wherever possible.*
- para 45: *In general: (a) an FMA body will not usually have a separate governing board (but may in some cases have an advisory committee); and (b) a CAC body will usually have a governing board.*
- para 64: *For a body to be governed by the CAC Act there must be both legal and financial separation from the Commonwealth.*
- para 70: *Finance has taken the view that, as a general rule, a body run by executive management (as opposed to by a governing board) should be regulated as a Statutory Agency under the PS Act.*



- e. Our research indicates that the Government has clear preferences about the governance structures it will allow to be put in place. Most relevantly, the Legislation Handbook, para. 6.39, stipulates that:
- 'The government's general position is that administration by a department (or, where relevant, a company structure or Executive Agency) is preferable to the creation of a statutory authority. Only where it is clear that there is a need for statutory powers to be exercised and where it is clear that those powers need to be exercised by a body that is to some degree independent of government should consideration be given to the establishment of a statutory authority.'*<sup>6</sup> (our emphasis)
- f. Any diminution of oversight or accountability of the body that is governing, managing and administering veteran and family entitlements would be a substantive concern. In this respect, we note the following:
- i. *'The level of oversight by the Courts appears to be less rigorous for statutory bodies than it is for departments.'*<sup>7</sup>
  - ii. Crown Immunity is, depending on the Act<sup>8</sup> to which the body is subject, extended to some Government-created bodies and not others.<sup>9</sup>
28. **Inference.** On balance, our research seems to suggest that the Inquiry is proposing a statutory body subject to the CAC Act 1997.
29. **Over-riding Concerns.** Irrespective of whether our deduction is correct or not, we would be concerned if disestablishment of DVA and its replacement:
- a. by any structure that abrogated ministerial oversight and accountability to the electorate; or
  - b. by a statutory body that:
    - i. undermined democracy by severing the fundamental values of democratic government; or
    - ii. enabled Government to:
      - (a) absolve itself of responsibility for an under-performing statutory body, or
      - (b) not take appropriate action to protect veterans and families legislated rights and entitlements.

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<sup>6</sup> Op cit. para 34.

<sup>7</sup> *'The responsibility to parliament for government contracting decisions has been gradually enhanced through increased obligations of disclosure, scrutiny and transparent but the courts have generally declined to subject government contracting to judicial review in the same way as other exercises of government power.'* Stewart, Daniel. 'Statutory Authority to Contract and the Role of Judicial Review'. <http://www.austlii.edu.au/au/journals/UQLawJl/2014/4.pdf> (accessed 12Mar19)

<sup>8</sup> CAC Act: Commonwealth Authorities and Companies Act 1997. At Note 4, FMA Act: Financial Management and Accountability Act 1997;

<sup>9</sup> The Office of the Parliamentary Council, Drafting Instruction No 3.6 states as follows (op cit):

- para 240: OPC has established a policy of expressly stating, for both incorporated and unincorporated bodies, whether or not the body is entitled to the same privileges and immunities as the Crown; and
- para 241: ... generally speaking, an FMA body should be entitled to the privileges and immunities of the Crown, while a CAC body should not.





30. **Recommendation.** We commend the Inquiry's reconsideration of its current position on the preceding Commonwealth Governance Guideline-related issues

### Other Issues

31. **Who is the Employer?** We note that:
- a. at the Sydney Public Hearing, Mr Isolani's oral evidence contended that the Crown, not a Department, is the employer; and
  - b. our research suggests this contention has merit.
  - c. the contention is inversely consistent with :
    - i. the 1994 McLeod Report,
    - ii. Minister Reith's 1996 Discussion Paper,
    - iii. the vectors in ongoing economic theory,
    - iv. ongoing Government policy to downsize the APS, and
    - v. the creation of statutory bodies that employ their own staff.

We would welcome the Inquiry's clarification of its intentions.

32. **Offer of Collaboration.** During ADSO's presentation to the Public Inquiry in Sydney and our private discussions, we offered collaboration by ESOs with the Inquiry's writing team. Our objective is to help the Inquiry minimise the likelihood of an ESO-community backlash against its Final Report. We reiterate that, as Members of ADSO, we are part of a network of 18 ESOs – both traditional (WWI to Vietnam) and contemporary (post-1990). We are also in close liaison with Legacy. Should the Inquiry decide to avail itself of our offer, we are prepared to bridge the gap between the Inquiry and ESOs.

### Conclusion

33. We remain concerned about the presumptions and underpinning principles that the Inquiry is bringing to the Issues Paper and Draft Report and, we deduce from the Public Hearings and private discussions, the forthcoming Final Report.
34. This Supplementary Report addresses further concerns arising from the Public Hearings and private discussions. We look forward to further engagement with the Inquiry to ameliorate our concerns.

Carl Schiller, OAM, CSM  
President  
Air Force Association Ltd

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